IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:28.02. 2007

CORAM:
THE HONOURABLE MR. JUSTICE V. DHANAPALAN

W.P. No.28555 of 2004

The Tamil Nadu Civil Supplies Corporation Limited
Represented by the Regional Manager
Vellore Region
Vellore .. Petitioner

vs.

1. The Tamil Nadu Civil Supplies Corporation Employees' Union
represented by its General Secretary
(in the matter of Mr. P. Subramanian)

2. The Labour Court
Vellore .. Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for a writ of certiorari as stated therein.

For petitioner Mr. J.A. Selvakumar

For 1st respondent Mr. S. Venkataraman

O R D E R

The Tamil Nadu Civil Supplies Corporation Limited (in short "the Corporation") has filed this writ petition seeking a writ of certiorari to call for the records of the second respondent in I.D. No.234 of 2001 dated 19.12.2003 and to quash the same.

2. The case of the petitioner Corporation, in a nutshell, as culled out from the affidavit, is as below:

a. One P. Subramanian, a member of the first respondent Union (in short "the employee") joined the Corporation on 15.04.1976 as Junior Assistant and due to some dispute with regard to his age, his promotion was kept pending and his immediate Junior by name S. Annamalai was promoted as Assistant with effect from 04.12.1981 and thereafter, as Superintendent on

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09.01.1987. The employee submitted a representation dated 11.11.1982 to the Chairman & Managing Director of the Corporation against the fixation of his seniority and on 16.03.1994, the latter passed an order in Appeal Petition directing the Corporation to promote the employee as Assistant with effect from 04.12.1981 and as Superintendent with effect from 09.01.1987 on par with his immediate junior and accordingly, he was promoted but without monetary benefits.

b. Though the employee accepted the notional promotion granted to him and started working as Superintendent, the first respondent union filed I.D. No.234 of 2001 before the Labour Court, Vellore, the second respondent, after a delay of over 7 years, claiming monetary benefits for the period from 04.12.1981 to 06.10.1994. The Labour Court, on 19.12.2003, passed an order directing the Corporation to calculate the monetary benefits for the period as claimed by the employee and also to pay him the same. Questioning the legality of the said order of the second respondent, this writ petition has been filed by the Corporation.

3. The main grounds of challenge in this writ petition are that: (i) the industrial dispute preferred by the Union on behalf of the employee, that too, after a delay of over seven years, is not maintainable, especially when the employee has accepted the notional promotion and (ii) when the employee has not shouldered any higher responsibility in the promoted posts, the claim of the union for payment of differential wages is not maintainable.

4. The employee, who has since retired from service, has filed his counter and his case, in brief, is as under:

a. As the subject matter of the dispute fell under the definition of industrial dispute under Section 2K of the Industrial Disputes Act, 1947 and was not an individual dispute and as such, the Union was competent in sponsoring the dispute. As per the seniority list, he should have been given promotion as Assistant on 04.12.1981 and as Superintendent on 09.01.1987 but not so. His appeal to the Chairman cum Managing Director in this regard was allowed on 16.03.1994, nearly twelve years from the date of his appeal but without eligibility for arrears of pay and allowances for the period between 04.12.1981 to 06.10.1994. His representations for re-consideration of the order dated 16.03.1994 were rejected by an order dated 19.04.1995. To get his right enforced, he raised

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a dispute before the Labour Officer, Conciliation with the strength of G.O. Ms. No.977 P & A R Department dated 06.11.1986 which was resisted by the Corporation on the ground that only G.O. Ms. No.905 (P & A.R. (Pension) (M) Department dated 19.09.1981 would be applicable to him and that the Corporation would place the Government Order relied on by him before the Board of Directors for their acceptance and adoption to the employees of the Corporation. This submission of the Corporation was recorded by the Labour Officer, Conciliation who closed the dispute with a direction to the Corporation to take steps for approval of G.O. Ms. No.977 by the Board of Directors and to confer the benefit on the employee on such approval. The Labour Officer, Conciliation, further gave liberty to the employee to renew his plea if no positive action was taken by the Corporation and accordingly, since no positive action emanated from the Corporation for a considerable period of time, he renewed his plea before the Labour Officer, Conciliation and since the Corporation pleaded that the employee's claim could be granted only if G.O.Ms.No.977 was adopted by the Board of Directors, the dispute was closed and hence, reference was made by the Government to the Labour Court, the second respondent herein in I.D. No.234 of 2001.

b. Before the Labour Court, though the Corporation admitted the factual position of the retrospective grant of promotion initially as Assistant and subsequently as Superintendent, it resisted the claim on the ground that the cumulative effect of G.O.Ms. Nos.905 and 977 does not confer the right to claim arrears of pay on retrospective promotions. The Labour Court, on 19.12.2003, considering the fact that G.O.Ms.No.977 was approved and adopted by the Corporation vide its Circular No.74 of 2001 dated 13.09.2001, upheld the employee's claim as against which, the present writ petition by the Corporation.

5. Mr. J.A. Selvakumar, learned counsel for the Corporation has contended that the employee could not satisfactorily account for the fact that he was in due age for employment and lost a considerable period in that process and in view of that, his promotion got delayed and not due to any lapse on the part of the Corporation. He has further contended that the employee's claim was not considered favourably in the light of twin G.Os. in Ms. Nos.905 and 977 dated 19.09.1981 and 16.10.1986 respectively which cumulatively are to the effect that an employee overlooked for promotion cannot demand arrears of pay from the date of deemed promotion but only from the date of actual assumption of charge and

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this aspect was totally overlooked by the Labour Court and that being the case, the impugned order passed by the second respondent-Labour Court has to be quashed and the writ petition allowed.

6. Mr. Selvakumar, learned counsel for the Corporation, in support of his arguments, has relied on a judgment of the Supreme Court reported in (1990) 4 SCC 744 in the case of Bank of India vs. T.S. Kelawala & Others (para 25)

> "Apart from the aforesaid ratio of the decisions and the provisions of the Payment of Wages Act and similar statutes on the subject, according to us, the relevant provisions of the major legislation governing the industrial disputes, viz., the Industrial Disputes Act, 1947 also lend their support to the view that the wages are payable pro rata for the work done and hence, deductible for the work not done. Section 2(rr) of the said Act defines "wages" to mean "all remuneration. . . which would, if terms of employment, expressed or implied, were fulfilled, be payable to workman in respect of his employment or work done in such employment..." while Section 2(q) defines "strike" to mean "cessation of work" or "refusal to continue to work of accept employment by workman". Reading the two definitions together, it is clear that wages are payable only if the contract of employment is fulfilled and not otherwise. Hence, when the workers do not put in the allotted work or refuse to do it, they would not be entitled to the wages proportionately."

7. In response, Mr. S. Venkataraman, learned counsel for the first respondent union has contended that by the time the Industrial Dispute was taken on file by the second respondent-Labour Court, G.O. Ms.No.977 was approved and adopted by the Board of Directors of the Corporation on which basis, the Corporation should have considered the employee's claim for arrears of pay favourably. Secondly, it his argument that when the employee's plea for promotion was considered after a long span of 12 years due to no fault of his but on the part of the Corporation, the contention of the Corporation that the employee's claim for arrears of pay and allowances cannot be considered as he was given only notional promotion, cannot be sustained.

8. While replying to the contention of the counsel for the Corporation that the cumulative effect of two G.Os. namely, G.O.Ms.No.905 and 977 does not permit arrears of pay and allowances, the counsel for the first respondent has contended that when admittedly G.O. Ms. No.977 supersedes G.O. Ms. No.905,

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the latter automatically loses its value and when the Corporation has approved and adopted G.O. Ms.No.977 in the Meeting of its Board of Directors held on 03.09.2001, the same holds good and on that basis, the Corporation should have given its favourable consideration to the employee's claim.

9. It is the further contention of the counsel for the first respondent that had the Corporation promoted the employee at the time when his promotion fell due, he would have shouldered higher responsibility and would have accordingly discharged his duties and in that sense, the contention of the counsel for the Corporation that the arrears of pay and allowances cannot be granted for higher responsibility not shouldered by him, does not have legs to stand. Finally, it is the contention of the counsel for the respondent that the second respondent-Labour Court has rightly taken into consideration the approval and adoption of G.O. Ms. No.977 by the Board of Directors while deciding the dispute in favour of the employee and as such, the present writ petition has to be dismissed as it deserves no consideration.

10. In support of his contentions, Mr. Venkataraman, learned counsel for the first respondent has relied on a judgment of this Court reported in 1986 WLR 291 in the case of G. Maria Selvaraj vs. The Joint Manager(Port Operation) Food Corporation of India Madras - 1 and Zonal Manager, Food Corporation of India, Madras - 6 (paras 2, 3 and 5)

> ". . .Hence, it is contended that, consequent to a change of declaration of law, petitioner having succeeded, he could only secure the notional promotion from the retrospective date, but in so far as the pay and emoluments are concerned, as per the Circular dated 11.02.1986, the monetary benefits could be only from the actual date from which the employee has joined the higher post.
>
> The sole point which requires consideration is, whether in spite of securing promotion, from a date from which he ought to have been allowed to function in the said post, should he be rest content with the seniority being refixed from the date on which he had been deprived to hold the promotional post or could he also claim the monetary benefits which are attached to the said promotional post.
>
> It would be wrong to hold that it is only by the pronouncement of a judgment, a right accrues for the first time. A right which had already existed is recognised when a judgment is

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pronounced. Equally, when the scope of a Constitutional provision is interpreted, it would be erroneous to construe as if it is only from the date of judgment such a Constitutional provision had come into existence. What is spelt out in a decision is only in recognition of what had been contemplated under the law from the date on which it had been brought into force. . ."

11. Further reliance has been placed by the counsel for the first respondent on a judgment of the Supreme Court reported in 1998 SCC (L & S) 1273 in the case of Secretary-cum-Chief Engineer, Chandigarh vs. Hari Om Sharma & Others (para 8)

"Learned counsel for the appellant attempted to contend that when the respondent was promoted in stop-gap arrangement as Junior Engineer-I, he had given an undertaking to the appellant that on the basis of stop-gap arrangement, he would not claim promotion as of right nor would he claim any benefit pertaining to that post. The argument, to say the least, is preposterous. Apart from the fact that the Government in its capacity as a model employer cannot be permitted to raise such an argument, the undertaking which is said to constitute an agreement between the parties cannot be enforced at law. The respondent being an employee of the appellant had to break his period of stagnation although, as we have found earlier, he was the only person amongst the non-diploma-holders available for promotion to the post of Junior Engineer-I and was, therefore, likely to be considered for promotion in his own right. An agreement that if a person is promoted to the higher post or put to officiate on that post, or, as in the instant case, a stop-gap arrangement is made to place him on the higher post, he would not claim higher salary or other attendant benefits would be contrary to law and also against public policy. It would, therefore, be unenforceable in view of Section 23 of the Contract Act, 1872."

12. Mr. Venkataraman has relied on yet another judgment of the Supreme Court reported in AIR 1977 Supreme Court 1868 in the case of S. Krishnamurthy vs. the General Manager, Southern Railway (paras 2 and 5):

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"The appellant joined the Southern Railway as a clerk way back in October 1948 and was confirmed as train clerk on April 1, 1949. He worked his way up and became a wagon chaser in an ex cadre post. Thereafter, he was entitled to become Assistant Yard Master but, for reasons which we need not go into, he continued as wagon chaser. The promotion post for Assistant Yard Master is that of traffic inspector. Unfortunately, the appellant was not considered for that post although others similarly situated like him were absorbed as traffic inspectors. The Railway Administration discovered the injustice and set right the error of not treating the appellant as an Assistant Yard Master by its order dated November 10, 1965; but by this time others had been absorbed as traffic inspectors and the appellant was not. His representation proving unsuccessful, he moved the High Court under Art. 226 for the relief of being treated as traffic inspector with effect from 1st January, 1959 when those others similarly situated were so absorbed. The conflicting fortunes of the case have already been indicated and all that we need say is that in the light of the order of the Railway Administration dated November 10, 1965, there has been an injustice inflicted on the appellant.

5. Yet another point that arises is as to what is to happen regarding his arrears of salary from December 20, 1967 and for the post-writ petition period. We make it clear that while seniority is being notionally extended to him from 01.01.1959, the appellant will not be entitled to any salary qua traffic inspector prior to 20th December, 1967. However, he will be entitled to salary on the terms indicated above from 20th December 1967 as traffic inspector that is to say, he will be eligible to draw the difference between what he has drawn and what he will be entitled to on the basis we have earlier indicated in this judgment."

13. I have given heedful thought to the case of the parties, the rival contentions of the counsel on either side and the judgments relied on by them.

14. The date of joining of the employee in the petitioner Corporation and the dates on which his promotion as Assistant and Superintendent fell due, are not disputed. This is clear from the

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order of the Chairman and Managing Director of the petitioner Corporation dated 16.03.1994 granting him promotion with effect from the date it fell due. Since the employee was not given promotion as "Assistant" on the date it fell due, he had addressed a representation dated 11.11.1982 to the Chairman and Managing Director of the petitioner Corporation and the same has been considered only on 16.03.1994, nearly after 12 years. In that order dated 16.03.1994, the employee has been denied the eligibility to get arrears of pay and allowances for the period 04.12.1981 to 06.10.1984. His representations for reconsideration of the order dated 16.03.1994 were rejected by an order dated 19.04.1995 and in order to enforce his right, he had raised a case with the second respondent Labour Court in I.D. No.234 of 2001 under Section 2(k) of the Industrial Disputes Act through the first respondent union.

15. Before the second respondent Labour Court, the first respondent union has marked as many as 20 exhibits and no exhibit has been marked by the petitioner Corporation. Ex.A.12 marked on the side of the first respondent union is the G.O.Ms.No.977 dated 16.10.1986 which has been issued by the Government in amendment of Fundamental Rule 27 with regard to fixation of pay on promotion or appointment to higher post after restoration of original seniority. In that Government Order, a reference has been made to the earlier G.O.Ms.No.905 dated 19.09.1981 and also to a subsequent letter of the Department dated 08.06.1982. In other words, while issuing G.O. Ms.No.977, the Government has given due consideration to the earlier G.O. Ms.No.905 and also its subsequent communication. The amendment made through G.O.Ms.No.977 is as under:

> "AMENDMENT
>
> In the said Fundamental Rules under Rule 27, after ruling (16), the following shall be added, namely:
>
> "(17) In case where a Government servant has been overlooked for promotion/appointment to the next higher post but subsequently promoted/appointed to that higher post after restoration of his original seniority on appeal, his pay shall be fixed on the date of assumption of charge in the higher post on par with the pay of his junior provided he has drawn the same rate of pay as his junior in the lower post from time to time; if he has not drawn the same rate of pay as his junior in the lower post, his pay shall be fixed, on the date of assumption of charge, at the stage at which he would have drawn pay on that date had he been promoted/appointed to the higher post along with his junior. In cases where seniority has been restored on or after 15th September 1981, arrears of pay and allowance consequent on fixation of pay shall be admissible with effect from the date of assumption of charge in the higher post; in cases where seniority has been restored prior to 19th September 1981, arrears

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shall be admissible only with effect from the above date".

(By order of the Governor)

Sd/-(P. Eswaramurthi)
Deputy Secretary to Government"

16. The above Government Order has been placed in the 331st Meeting of the Board of Directors of the petitioner Corporation and the same was resolved to be adopted for the petitioner Corporation and the petitioner Corporation has also issued a Circular dated 13.09.2001 to the effect that G.O.Ms.No.977 has been approved by the Board of Directors and adopted for the Corporation. Al already stated, this Government Order is for amendment of the Fundamental Rules in fixation of pay on promotion or appointment to higher post after restoration of the original seniority. The object of the amendment is sought to be achieved through the respective rule and having adopted the above Government Order, the petitioner Corporation cannot interpret the Government Order to the disadvantage of the employee who has been denied his due promotion. Even before the Labour Officer, Conciliation, it was the stand of the petitioner Corporation that only G.O.Ms.No.905 is applicable and G.O.Ms.No.977 would be applicable only after approval and adoption of the Board of Directors. Before the second respondent Labour Court, though the petitioner Corporation has admitted that G.O.Ms.No.977 has been approved by the Board and adopted by the Corporation, it has resisted the claim on the ground that a cumulative reading of the two Government Orders would not entitle the employee to receive arrears of pay and allowances. This makes it clear that the petitioner Corporation took two different stands before the Labour Officer, Conciliation and the Labour Court. The contention of cumulative reading of the Government Orders raised by the petitioner Corporation cannot be sustained for the reason that once an amendment to Fundamental Rule is made through G.O.Ms.No.977 by referring to G.O. Ms.No.905, G.O.Ms. No.977, which is issued subsequently in furtherance to G.O.Ms. No.905 gets the superseding power and puts G.O.Ms.No.905 in nullity and in that view of the matter, no need whatsoever arises to give a cumulative reading of the two Government Orders.

17. The other contention on the side of the petitioner Corporation is that the first respondent union has approached the Labour Court with a delay of nearly seven years and by this long gap itself, the claim of the employee should be denied. As the claim itself is for the period 04.12.1981 to 06.10.1994 during which the employee ought to have been promoted and not for the period after 06.10.1994, the contention of the petitioner Corporation cannot have legs to stand. For the delay on the part of the employee in approaching the Labour Court, the only claim he

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cannot make is with regard to interest for seven years and it is not justifiable to say that he is not entitled to the claim itself.

18. In addition to the above, there is one more point to be considered in regard to the matter. Though the petitioner Corporation has contended the employee could not account for his age and on account of that, there was some delay in his promotion, the long span of twelve years taken by the Chairman and Managing Director to dispose of the representation of the employee in connection with his seniority, is too big a pill to swallow and for this inordinate delay, there has been no explanation on the side of the petitioner Corporation.

19. Thus, having regard to the facts and circumstances of the case and the judgments relied on by the counsel on either side and considering the fact that G.O.Ms.No. 977 has been approved by the Board of Directors of the petitioner Corporation and adopted by the petitioner Corporation, I am of the considered view that the conclusion of the second respondent Labour Court in directing the petitioner Corporation to calculate the monetary benefits of the employee for the period 04.12.1981 to 06.10.1994 and also to pay him the same, is perfectly in order and does not warrant any sort of interference by this Court.

In view of the above findings, the writ petition, which is devoid of any merit, does not deserve any favourable consideration and is liable to be dismissed. Accordingly, it is dismissed without any order as to costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

cad

To

The Presiding Officer,
The Labour Court
Vellore

1 cc to Mr.S. Vankatraman, Advocate, Sr. 12484
1 cc to Mr.J.A. Selvakumar, Advocate, Sr. 12494

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